IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

APPEAL NO.24 OF 2006
IN
ARBITRATION PETITION NO.203 OF 2005

Oil & Natural Gas Corporation Ltd. Appellants
vs.
Western Geco International Ltd. Respondents

Mr.D.R.Zaiwalla, senior counsel with Mr.P.A.Sawant &
Mr.Prakash Shinde, Advocates i/b.M/s.M.Dhruva & Co. for
the appellant.

Mr.D.J.Khambatta, senior counsel with Ms.Mallika Iyer
i/b.Mr.Hemant Sethi for the respondents.

CORAM : R.M. LODHA &
ANOOP V. MOHTA, JJ.

DATED : 10th February 2006

ORAL ORDER (Per R.M.Lodha,J.)

Heard Mr.D.R.Zaiwalla, the learned senior counsel for the appellants and Mr.D.J.Khambatta, the learned senior counsel for the respondents.

2. On 20th January, 2006 we passed the following order:

> "2. The learned counsel for the appellants raised three fold submission before us: (one) that the Arbitral Tribunal as well as the learned Single Judge erred in holding that for the period from 14th September, 2001 to March 21, 2002, the delay cannot be attributed to the claimants solely with regard to substitution of the Canadian M2 Hydrophones for the US Geopoint Hydrophones; (two) that the ARbitral Tribunal was not legally right in holding that the present appellant was not justified in deducting the tax component

amounting to US $ 4,10,641.20 and US $ 80,530.10; and (three) that the Arbitral Tribunal erred in awarding pendente lite interest at the rate of 8% p.a. on the sum of US $ 2,936,607.82 (Dollars two million thirty six thousand six hundred seven and cents eighty two only) and future interest at the rate of 6% p.a. on the principal amount of US $ 2,936,607.82.

3. On prima facie consideration of the matter, we indicated to Mr.Sawant that there is no merit in contentions one and two. However, as regards award of future interest by the Arbitral Tribunal, we found some merit in the contention of Mr.Sawant and indicated that Appeal may be admitted to that extent. At this stage, Mr.Khambatta, learned senior counsel for the respondents submitted that if the appellant pays the principal amount and pendente lite interest as per the Award, the respondent is agreeable to waive future interest as awarded by the Arbitral Tribunal. We found submission of Mr.Khambatta reasonable and accordingly asked Mr.Sawant whether there was any possibility to settle the matter accordingly. Mr.Sawant prays for time.

4. S.O. to 30th January, 2006."

3. Thereafter the matter came up before us on 30th January 2006 and by the consent of the learned senior counsel for the parties, the matter was adjourned for today.

4. Mr.D.J.Khambatta, the learned senior counsel, at the outset, submitted that the respondent waives the pendente lite interest at the rate of 8% p.a. on the sum of US $ 2,936,607.82 (Dollars two million thirty six thousand six hundred seven and cents eighty two only) and future interest at the rate of 6% p.a. on the principal amount

of US $ 2,936,607.82. (Dollars two million nine hundred thirty six thousand six hundred seven and eighty two cents). He submitted that to that extent award be modified.

5. The waiver of pendente lite and future interest by the respondent takes care of the appellants' contention (three) as noted in our order dated 20th January, 2006.

6. Mr.D.R.Zaiwalla, the learned senior counsel re-iterated the contentions (one) and (two) that were raised before us on 20th January 2006.

7. In our order dated 20th January, 2006, prima facie we indicated that there was no merit in these two contentions but since the matter was adjourned on that date, we did not deal with these contentions. Now we do.

Re: Contention (one)

8. The Arbitral Tribunal recorded that the national origin of the hydrophones used in the Nessie-4 streamers was a material term of the contract between the parties. There is no challenge to this finding. The Arbitral Tribunal on the issue whether ONGC was justified in refusing to allow substitution of the Canadian M-2 hydrophones for the US Geopoint Hydrophones held that

once the claimant (respondent herein) had made the choice, ONGC was entitled to insist on the hydrophones of US make; however, once the claimant had informed ONGC that it treated this option as closed and ONGC was not justified in insisting and pursuing the same. As regards the issue relating to delay in performance of the contract, the Arbitral Tribunal held in the affirmative. As to who was responsible for the delay, the Arbitral Tribunal held that in so far as the delay for the period from 9th July 2001 upto 14th September 2001 is concerned, the delay was solely attributable to the claimant. In respect of the delay post September 14, 2001, the Arbitral Tribunal found that the claimant was pursuing the respondent to examine the alternative/substitution Canadian hydrophones vide their letters dated 16th & 21st October 2001. ONGC also informed by their letter dated 21st October 2001 that the replacement viz., Canadian hydrophones were tested. However, ONGC did not respond to the claimant's proposal to substitute the US hydrophones to the Canadian hydrophones but insisted the claimant to apply afresh for grant of licence by their letter dated 26th November 2001. The claimant did so as desired by the ONGC but the said application was withdrawn as US Commercial Department indicated to the claimant that such application would be rejected. The claimant communicated to the ONGC the withdrawal of application vide letter dated March 22, 2002. The ONGC

insisted for copy of the denial order and after it was received from US Embassy on March 21, 2002, ONGC agreed for a replacement. Based on these facts, the Arbitral Tribunal found that the delay of the period from October 16, 2001 to March 21, 2002 was attributable to ONGC and, accordingly, held that the deduction in the sum of US $ 2,445,436.53 for the delay for the period from November 1, 2001 to March 22, 2002 was not justified. The Arbitral Tribunal, thus, held that the claimant would be entitled to that sum from ONGC together with interest at the rate indicated in the Award.

9. The finding recorded by the Arbitral Tribunal that the delay for the period from October 16, 2001 to March 21, 2002 was not attributable to the claimant is based on consideration of the facts and the material placed before the tribunal and in this view of the matter, the finding of the learned Single Judge that the said finding of the Arbitral Tribunal does not suffer from any error, in our opinion, warrants no interference.

Re: Contention (two)

10. Mr.D.R.Zaiwalla, the learned senior counsel for the appellant-ONGC vehemently contended that the ONGC was justified in deducting tax component amounting to US $ 410,641.20 and US $ 80,530.10. According to him, the

claimant represented to the ONGC that the prices were inclusive of corporate income tax as per Section 44BB of the Income Tax Act and the personal tax on contractor's employees and since no personal tax or corporate tax was paid by the claimant, the appellant was justified in deducting the tax components. He would submit that if the said amount was not deducted it would amount to unjust enrichment to the claimant under Section 72 of the Indian Contract Act. He relied upon the judgement of the Supreme Court in the case of Mahabir Kishore v. State of Madhya Pradesh, **A.I.R.1990 SC 313.**

11. We find no merit in the argument. In the tender document submitted by the claimant, the contract price was set out in paragraph 12 thus:

> "CONTRACT PRICE
>
> The Total Lump-sum Contract price is USD 17,221,384/- (United States Dollars Seventeen Million, Two Hundred and Twentyone thousand, three hundred and eighty four only) for entire scope of work (including Optional items and additional scope of work and dry dock jobs) at the Ship repair unit proposed by the Contractor, inclusive of material cost, service charges, training charges, all type of freights (land, marine & air), insurance charges, duties, taxes, levies, manpower, clearance, material handling, experts services as stipulated in Clause No.A.14.3 of BEC and all the incidental expenses.
>
> A) Material Cost.
>
> i) Essential Equipments/systems
>
> . Total material cost for entire Essential

Equipment/systems stipulated in Technical specifications - US$ 10,490,760/- (United States Dollars Ten Million, four Hundred Ninety Thousand, Seven Hundred & Sixty only).

ii) Material required for structural chances & Fabrication

. Total material cost of all the items required for Structural changes including fabrication job. - US$ 640,000/- (United States Dollars Six Hundred Forty Thousand only).

iii) Spares & consumables for 1 year Operation & Maintenance - US$ 1,681,977/- (United States Dollars One Million, Six Hundred Eightyone Thousand, Nine Hundred and Seventy Seven only).

. Cost of Manufacturer's recommended spares & consumables for 1 year Operation & Maintenance of various systems/equipments as stipulated in Technical specifications.

B) Service Charge.

. Lump sum service charge of US$ 960,000/- (United States Dollars Nine Hundred Sixty Thousand only) for Structural changes, installation, integration, interfacing, commissioning and acceptance shall include (a) all expenses for tools, facility, equipment, labour and work required, (b) structural changes, including fabrication work and arrangement of Shipyard berthing, space, pilot and certification on stability & load test by ABS & IRS, (c) Installation, Integration & commission various systems/equipment supplied & Interfacing with non-replaced systems/equipment till Static & Dynamic Trial Test of upgraded vessel, (d) handing over the old replaced systems/equipment to CORPORATION (e) all other incidental expenses.

Note:-

. Cost of fuel, lubricants, and other requirement of CORPORATION and its O & M

contractor & the Vessel shall be at CORPORATION's account. However, contractor on CORPORATION's request shall arrange to supply these items at the designated ship repair unit for which CORPORATION will reimburse the actual cost.

C) Training charges.

. Training charges of US$ 332,000/- (United States Dollars Three Hundred and Thirty Two thousand only) are for various training programme (as per part-III) for the required number of CORPORATION personnel at respective system/equipment at Manufacturer's premises.

. Note -

. Cost of travel, boarding and lodging of CORPORATION personnel deployed for training shall be on CORPORATION's account. However, CORPORATION may seek assistance from contractor, if required.

D) Expert charges

. Expert charges for deployment as per BEC clause No.A.14.3.

. US$ 2,000/- (United States Dollars Two Thousand only) per day/per expert for 42 days.

. Total: US$ 168,000/- (United States Dollars One Hundred and sixty Eight Thousand only).

E) Additional scope of work/Dry Dock jobs excluding Tail Shaft Services' US$ 465,494/- (United States Dollars Four Hundred Sixty Five Thousand, Four Hundred and Ninety Four only).

F) Optional items (6 items i.e. item 11.1.0, 5.1.11, 5.27, 5.28, 5.29 & 13.1.5 Part -III B). US$ 2,483,153/- (United States Dollars Two Million, Four Hundred Eighty Three Thousand, One Hundred and Fifty Three only).

II) <u>FIRM PRICES</u>

. The contract price including unit price of various items as detailed in price schedule shall REMAIN FIRM until the entire works are completed and shall not be subject to escalation on any ground whatsoever.

III) For the purposes of L.D., Performance Bank Guarantee and recovery for excess engagement of Vessel, the total contract price shall mean the total Evaluated PRICE i.e. US$ 17,221,384/- (United States Dollars Seventeen Millions, Two Hundred Twentyone Thousand, Three Hundred and Eighty Four only)."

12. As regards corporate and personnel tax, clause 21 of the tender document provided that the contractor shall bear all personnel and corporate taxes levied or imposed on the contractor and subcontractors. Clause 21 reads thus:

"21.0 CORPORATE AND PERSONNEL TAX

. The Contractor shall bear all Personnel and Corporate taxes levied or imposed on the Contractor and be responsible for all taxes levied or imposed on their subcontractor(s) under the contract, including but not limited under the provision of Income Tax Act 1961 or any amendment thereof and under the Companies (Profit) Surtax Act of 1964 or any amendment thereof on account of payments received by him from the Corporation for work done under the Contract. It shall be the responsibility of the contractor to submit to the concerned Indian authorities the returns and all other connected documents required for this purpose. The contractor shall also provide the Corporation such information, as it may be required in regard to the Contractor's income and expenditure under the contract for

proper assessment of taxes and duties. The Contractor and his sub-contractor or his personnel shall bear all taxes levied on the contractor's and sub-contractor's personnel. .

. Should the Contractor fail to submit return/pay taxes in time as under The Indian Tax Act and consequently any interest or penalty is imposed by; the Indian Income Tax Authority, the said interest/penalty shall be paid by the Contractor only.

. The Corporation shall if so required by applicable laws in force, at the time of payment, deduct income tax payable by the Contractor at the rates in force, from the amount due to the contractor and pay to the concerned tax authority directly.

. The Contractor agrees that he and his subcontractor(s), shall pay Indian Income Tax as may be imposed/levied on them by the Indian Income Tax Authorities for the payments received by them for the works under the contract.

. The Contractor, his subcontractor(s) and the personnel deployed by them shall comply with the Indian Income Tax Act in force from time to time.

. The Contractor shall indemnify Corporation against any and all liabilities of claims for such taxes including interest and penalty which any such taxing authority may assess or levy against the Corporation/Contractor.

. In case any tax benefit is derived by the Contractor consequent upon assignment of Part of the works covered under the Contract by way of sub-contracting or assignment as per clause 8 of the Contract from Non-Resident Indian Company to an Indian Company due to the reductions of tax payable, then the contract price shall be reduced by an amount of tax benefit so derived due to change of status of the Company from non resident to

resident."

13. The claimant submitted Exception/Deviation Proforma (Appendix-5) and in relation to Article 21 relating to Corporate and Personnel tax, the claimant proposed amendment thus:

> "The prices are inclusive of Corporate income tax as per the provisions of Section 44BB of the Income Tax Act, 1961 and personal tax on Contractor's employees. The prices do not include any other tax and levies including without limitation to customs duty on capital goods, equipment, tools raw materials, material handing equipment and consumables, sales tax (including tax on deemed sales and leases, except sales tax on purchase made by Contractor in India), excise duty, stamp tax, works contract tax, service tax, R & D Cess, octroi charges, entry taxes and other similar levies and taxes."

14. It was clarified by the claimant that the proposed amendment was inserted only as a matter of clarification and is not in the nature of an exception.

15. It is apparent from the aforesaid clause that the claimant clarified to the ONGC that prices were inclusive of corporate income tax as per the provisions of Section 44BB of the Income Tax Act, 1961 and personal tax on the contractor's employees. Merely because no corporate income tax was payable under Section 44BB by the claimant, it cannot be said that there was justification on the part of ONGC in deducting tax component amounting to US $ 4,10,641.20 (Dollars four

hundred ten thousand six hundred forty one and cents twenty) and US $ 80,530.10 (Dollars Eighty thousand five hundred thirty and cents ten). The Arbitral Tribunal cannot be said to have committed any error of law in holding so. Pertinently the contract does not specify any amount towards tax component. How could ONGC quantify tax component on their own and deduct the amount on that count. The facts that have come on record do not make out a case of unjust enrichment. The judgment of the Supreme Court in the case of Mahabir Kishore relied upon by Mr.Zaiwalla has no application.

16. We, thus, find no merit in the contentions (one) and (two) raised by the learned senior counsel for the appellant.

17. As already noticed above, the learned senior counsel for the respondent (claimant) made a categorical statement that the respondent waives pendente lite interest at the rate of 8% p.a. on the sum of US $ 2,936,607.82 (Dollars two million nine hundred thirty six thousand six hundred seven and cents eighty two only) and future interest at the rate of 6% p.a. on the principal amount of US $ 2,936.607.82 (Dollars two million nine hundred thirty six thousand six hundred seven and cents eighty two only). We, accordingly, direct that the pendente lite and future interest

awarded by the Arbitral Tribunal is not payable to the claimant and the Award passed by the Arbitral Tribunal stands modified to that extent.

18. Appeal is disposed of in terms stated above with no order as to costs.

(R. M. LODHA, J.)

(ANOOP V. MOHTA, J.)